To be Argued by:
PETER M. SARTORIUS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

TAXI TOURS INC.,

Plaintiff-Counterclaim Defendant,

– against –

GO NEW YORK TOURS, INC.,

Defendant-Appellant.

Appellate Case No.: 2022-01029

GO NEW YORK TOURS, INC.,

Counterclaim Plaintiff-Appellant,

– against –

BIG BUS TOURS LIMITED, GO CITY LIMITED, GRAY LINE NEW YORK TOURS, INC., TWIN AMERICA, LLC and SIGHTSEEING PASS LLC,

Counterclaim Defendants-Respondents,

– and –

GO CITY NORTH AMERICA, LLC, GO CITY, INC., TAXI TOURS INC. and OPEN TOP SIGHTSEEING USA, INC.,

Counterclaim Defendants.

BRIEF FOR COUNTERCLAIM DEFENDANTS-RESPONDENTS BIG BUS TOURS LIMITED AND GO CITY LIMITED

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STATUTES

Counterclaim Defendants-Respondents Big Bus Tours Limited and Go City Limited (collectively, "Counterclaim Defendants-Respondents"), and counterclaim defendants Go City North America, LLC, Go City, Inc., Taxi Tours, Inc., and Open Top Sightseeing USA, Inc. (collectively with Counterclaim Defendants-Respondents, the "Big Bus/Go City Defendants"), respectfully submit this respondents' brief in opposition to the appeal by counterclaim plaintiff-appellant Go New York Tours, Inc. ("Counterclaim Plaintiff-Appellant") from the Decision and Order of the Supreme Court, New York County (Schecter, J.), entered in the office of the New York County Clerk on January 3, 2022, which order (a) granted the motion by defendants Gray Line New York Tours, Inc., Twin America, LLC, and Sightseeing Pass LLC (collectively, the "Gray Line Defendants") to dismiss Counterclaim Plaintiff-Appellant's First Counterclaim for violation of New York's Donnelly Act (N.Y. Gen. Bus. L. § 340, *et seq.*) and Second Counterclaim for tortious interference with prospective business relations for failure to state a cause of action pursuant to CPLR 3211(a)(7); and (b) granted the motion by Counterclaim Defendants-Respondents to dismiss this action as against them for lack of personal jurisdiction pursuant to CPLR 3211(a)(8).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the I.A.S. Court properly dismiss Counterclaim Plaintiff-Appellant's claim for alleged violations of New York's Donnelly Act (N.Y. Gen. Bus. L. § 340, *et seq.*) (First Counterclaim) pursuant to CPLR 3211(a)(7) for failure to state a cause of action, where the Counterclaims contain only conclusory and speculative allegations about purported unlawful conspiracies between and amongst the Big Bus/Go City Defendants and the Gray Line Defendants? The Big Bus/Go City Defendants respectfully submit this question should be answered in the affirmative.

2. Did the I.A.S. Court properly dismiss Counterclaim Plaintiff-Appellant's claim for alleged tortious interference (Second Counterclaim) pursuant to CPLR 3211(a)(7) for failure to state a cause of action, where the Counterclaims contain only conclusory and speculative allegations about potential business relationships with third parties with which the Big Bus/Go City Defendants are alleged to have interfered, and the Counterclaims do not allege the requisite "wrongful means"? The Big Bus/Go City Defendants respectfully submit this question should be answered in the affirmative.

3. Did the I.A.S. Court properly dismiss Counterclaim Plaintiff-Appellant's claims against counterclaim defendant-respondent Big Bus Tours Limited pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, where Big

Bus Tours Limited is incorporated and headquartered in the United Kingdom, it does not transact any business in the State of New York, and the Counterclaims do not adequately allege that Big Bus Tours Limited engaged in any tortious conduct? Counterclaim Defendants-Respondents respectfully submit this question should be answered in the affirmative.

COUNTERSTATEMENT OF NATURE OF THE CASE

On appeal, Counterclaim Plaintiff-Appellant argues that the I.A.S. Court erred in dismissing its claims for alleged violations of New York's Donnelly Act (N.Y. Gen. Bus. L. § 340, *et seq.*) and tortious interference with prospective business relations, both claims related to counterclaim-defendants' alleged conspiracy to restrain trade in New York City's "hop-on, hop-off" tour bus industry by "freezing out" Counterclaim Plaintiff-Appellant by persuading various New York City tourist attractions to not do business with Counterclaim Plaintiff-Appellant.

Counterclaim Plaintiff-Appellant also argues that the I.A.S. Court erred in dismissing this action as against counterclaim defendant-respondent Big Bus Tours[1]—a company headquartered and organized in the United Kingdom—for lack of personal jurisdiction.

[1] The I.A.S. Court's dismissal order also dismissed this action as against counterclaim defendant-respondent Go City Limited—also headquartered and organized in the United Kingdom—for lack of personal jurisdiction. But Counterclaim Plaintiff-Appellant's appeal, as

The I.A.S. Court's order should be affirmed in all respects.

As for Counterclaim Plaintiff-Appellant's claim under the Donnelly Act (First Counterclaim), although the Counterclaims report throughout that a conspiracy exists between and amongst the Big Bus/Go City Defendants and the Gray Line Defendants to restrain competition in New York City's "hop-on, hop-off" tour bus industry, the Counterclaims fail to allege any "facts" at all to support that conclusion, as required for Counterclaim Plaintiff-Appellant to meet its pleading burden on this motion. Instead, the Counterclaims merely allege that it has itself suffered damages as a result of counterclaim-defendants' purported misconduct, which is insufficient as a matter of law. *See Associates Capital Services Corp. of N.J. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 13 (E.D.N.Y. 1982) (the Donnelly Act is "designed to protect competition and redress anticompetitive effects of a variety of unlawful business practices," and is "not [a] general prohibition[] of all types of activity which may result in economic harm to any individual business").

With respect to Counterclaim Plaintiff-Appellant's claim for tortious interference with prospective business relations (Second Counterclaim), the

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limited by its brief, does not seek reversal of the I.A.S. Court's order in this respect. Accordingly, Counterclaim Plaintiff-Appellant's appeal from that aspect of the I.A.S. Court's order is deemed abandoned. *See Mehmet v. Add2net, Inc.*, 66 A.D.3d 437, 438 (1st Dep't 2009) ("Plaintiff's appeal from the dismissal of his five other causes of action has been abandoned since he failed to address the claims in his brief.").

Counterclaims fail to allege the existence of any protected business relationship, and instead merely report Counterclaim Plaintiff-Appellant's aspirations to enter into trade partner agreements with various New York City tourist attractions, a desire that the Counterclaims concede was never reciprocated by those attractions.

Nor do the Counterclaims allege the requisite "wrongful means" sufficient to support Counterclaim Plaintiff-Appellant's tortious interference claim. To the contrary, the Counterclaims merely allege that counterclaim-defendants successfully persuaded various tourist attractions with which Counterclaim Plaintiff-Appellant hoped to do business to forego partnerships with Counterclaim Plaintiff-Appellants in favor of exclusive relationships with certain of the counterclaim-defendants. But it is well settled that "persuasion alone, although it is knowingly directed at interference" with a plaintiff's potential business relationship, does not constitute "wrongful means" sufficient to support a claim for tortious interference with prospective business relations. *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183, 191 (1980).

Finally, the I.A.S. Court correctly dismissed the claims against Big Bus Tours Limited—an entity both incorporated and headquartered in the United Kingdom, with no business activity at all in New York, for lack of personal jurisdiction. Long-arm jurisdiction over Big Bus Tours Limited does not exist under CPLR 302(a)(1) because it is undisputed that Big Bus Tours Limited does

not transact any business in the State, and the fact that it is the parent company of other counterclaim-defendants, namely Taxi Tours, Inc. and Open Top Sightseeing USA, Inc., that do transact business in the State is irrelevant to the jurisdictional analysis.

Nor is Big Bus Tours Limited subject to personal jurisdiction under CPLR 302(a)(3). Not only do the Counterclaims fail to plead any tortious conduct for the reasons described above, they also fail to allege any misconduct at all by Big Bus Tours Limited specifically, instead relying on improper group pleading against all counterclaim-defendants. This is insufficient to establish personal jurisdiction.

For these reasons, the I.A.S. Court correctly dismissed the First Counterclaim and Second Counterclaim for failure to state a cause of action pursuant to CPLR 3211(a)(7), and correctly dismissed this action as against Big Bus Tours Limited for lack of personal jurisdiction pursuant to CPLR 3211(a)(8). The I.A.S. Court's order should be affirmed in all respects.

COUNTERSTATEMENT OF FACTS

A. The "Hop-On, Hop-Off" Sightseeing Tour Bus Business

As alleged in the Counterclaims, there are three principal operators of "hop-on, hop-off" sightseeing bus tours in New York City: counterclaim-defendants Taxi Tours, Inc. and Open Top Sightseeing USA, Inc., which operate under the "Big Bus" brand name; counterclaim-defendants Gray Line New York Tours, Inc.

and Twin America, LLC, which operate under the "Gray Line" and "CitySightseeing" brand names; and Counterclaim Plaintiff-Appellant, which operates under the "TopView" brand name. (R. 63 at ¶ 17.) Their respective sightseeing buses generally follow set routes through areas of general interest to tourists, allowing their customers to "hop off" a bus at an attraction or place that interests them, and then to "hop on" another bus operated by the same company when they are ready to continue their tour. (R. 63 at ¶ 17.)

Separate from bus tours, the Counterclaims allege that affiliates of each of the Big Bus/Go City Defendants, Gray Line Defendants, and Counterclaim Plaintiff-Appellant are market and sell "Multi-Attraction Passes," which combine "hop-on, hop-off" sightseeing tour bus services with discounted admissions to various New York City sightseeing attractions and activities, such as Top of the Rock, Empire State Building, One World observatory, the Intrepid Sea, Air, and Space Museum, and others (the "Attractions"). (R. 65 at ¶ 24.)

While boasting of its "significant growth" over the last several years (R. 63 at ¶ 18), Counterclaim Plaintiff-Appellant alleges that its ability to compete in the first service has been unlawfully constrained by its shortcomings in the second service, namely its inability to sign "Multi-Attraction Pass" partnership deals with a handful of Attractions. (R. 68 at ¶¶ 34-42.) According to the Counterclaims, for a company to offer a Multi-Attraction Pass that bundles admission to a given

Attraction, the company must enter into a "trade partner" agreement with that Attraction, by which the Attraction agrees to make admission to their attraction available at a discounted rate when bundled with the partner's Multi-Attraction Pass, and the seller of the Multi-Attraction Pass paying the Attraction a fixed rate for each pass used at that attraction. (R. 65 at ¶ 25.) The Counterclaims allege that tour bus companies compete vigorously for both customers and partnerships with Attractions. (R. 67 at ¶ 30, R. 78 at ¶ 65.)

B. Prior Litigation History

Prior to the commencement of this action, Counterclaim Plaintiff-Appellant had sued certain of the counterclaim defendants and various affiliates in federal court, alleging anticompetitive conduct identical to that alleged here. *Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, 2019 WL 8435369, *1 (S.D.N.Y. Nov. 7, 2019) (LAK). In that action (just as in its Counterclaims here), Counterclaim Plaintiff-Appellant alleged that the counterclaim-defendants and others conspired to restrain trade by preventing Counterclaim Plaintiff-Appellant from securing "trade partner agreements" with various Attractions. *Id.* Counterclaim Plaintiff-Appellant asserted claims for violations of the Sherman Act, Clayton Act, and New York's Donnelly Act, a common law claim for tortious interference with prospective business relations based on the same allegations, as well a claim for tortious interference with contract alleging that counterclaim

defendants caused the Intrepid to terminate a trade partner agreement with Counterclaim Plaintiff-Appellant. *Id.*

On November 7, 2019, Judge Lewis A. Kaplan dismissed Counterclaim Plaintiff-Appellant's federal complaint for failure to state a claim. *Id.* Judge Kaplan granted leave to replead, after concluding that the complaint had not pleaded facts demonstrating the existence of any unlawful restraint that would violate federal antitrust laws or the Donnelly Act. *Id.* at *2-3. Judge Kaplan also held that Counterclaim Plaintiff-Appellant had failed to plead the requisite elements of its two tortious interference claims. *Id.* at *2-3. Instead, Judge Kaplan found that the complaint rested on "conclusory" and "cursory" allegations," "faulty inference[s]," and "sparse details," which collectively failed to satisfy Counterclaim Plaintiff-Appellant's pleading burden. *Id.*

Counterclaim Plaintiff-Appellant subsequently amended its complaint, but on March 4, 2020, Judge Kaplan again dismissed the Sherman Act claims for failure to state a claim, finding that the amended complaint was "virtually identical" to the previously dismissed complaint, and declined to exercise supplemental jurisdiction over Counterclaim Plaintiff-Appellant's claims arising under New York State law. (R. 302.) The Second Circuit Court of Appeals affirmed the dismissal on December 22, 2020 (*Go New York Tours, Inc. v. Gray Line New York Tours, Inc., et al.*, 831 Fed.Appx. 584 (Mem) (2d Cir. 2020), and

the Supreme Court denied *certiorari* on April 26, 2021 (*Go New York Tours, Inc. v. Gray Line New York Tours, Inc., et al.*, 141 S.Ct. 2571 (Mem.) (2021).

C. The Counterclaims

Counterclaim Plaintiff-Appellant filed its Amended Verified Answer and Counterclaims (the "Counterclaims") in this action on May 28, 2021. (R. 54.) The Counterclaims assert four counterclaims.

The First Counterclaim alleges that the "Counterclaim Defendants"—a collection of three Gray Line Defendants and six Big Bus/Go City Defendants—conspired to restrain trade in New York City's "hop-on, hop-off" tour bus industry via anti-completive "horizontal" agreements between each other, and anti-competitive "vertical" agreements between them and various Attractions. (R. 77, *et seq.*)

As for the alleged "horizontal" agreements, the Counterclaims allege that the counterclaim defendants conspired with each other to effectuate a "virtual boycott" by "leading and popular" tourist Attractions. (R. 73 at ¶ 48.)

And as for the alleged "vertical" agreements, the Counterclaims allege that the Counterclaim Defendants conspired "to require and/or to persuade" tourist attractions not to do business with Go New York (R. 67 at ¶ 31), and identify a mere six Attractions, out of dozens across New York City, with which Counterclaim Plaintiff-Appellant claims to have been unsuccessful in negotiating

trade partner agreements for its Multi-Attraction Pass program (R. 68, *et seq.*, at ¶¶ 34-41.)

For example, the Counterclaims allege that Counterclaim Plaintiff-Appellant has been unable to include the Empire State Building Observatory in its Multi-Attraction Pass because the operator of that attraction "has an exclusive relationship with" certain of the counterclaim-defendants, who "required that [the Empire State Building] not do business with Go New York." (R. 69 at ¶ 36.)

The Second Counterclaim, for tortious interference with prospective business relations, alleges that the counterclaim-defendants "wrongfully and falsely disparag[ed] Go New York to Attractions" and threatened to stop "doing business" with tourist attractions if they entered into trade partner agreements with Go New York. (R. 80 at ¶ 76.)

The Third Counterclaim alleges that the Big Bus/Go City Defendants engaged in deceptive business practices in violation of N.Y. Gen. Bus. L. § 349, by "engaging in a pattern and practice of astroturfing, posting fact disparaging reviews, and making false and/or misleading representations about both TopView and Big Bus in its advertising materials." (R. 80 at ¶ 79.)

Finally, the Fourth Counterclaim alleges that the Big Bus/Go City Defendants engaged in false advertising in violation of N.Y. Gen. Bus. L. § 350, by "engaging in a pattern and practice of astroturfing, posting fake disparaging

reviews, and making false and/or misleading representations about both TopView and Big Bus in its advertising materials." (R. 81 at ¶ 84.)

D. The I.A.S. Court's Dismissal Order

Counterclaim-Defendants filed two motions to dismiss the Counterclaims: (a) Big Bus Tours Limited and Go City Limited sought dismissal of the Counterclaims, in their entirety, as asserted against them pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction (R. 128); and (b) the Gray Line Defendants sought dismissal of the claims asserted against them (the First and Second Counterclaims) pursuant to CPLR 3211(a)(7) for failure to state a cause of action (R. 188).

In support of their motion to dismiss for lack of personal jurisdiction, Big Bus Tours Limited and Go City Limited submitted three sworn affidavits: Julia Conway, Treasurer and Director of Taxi Tours, Inc., and Treasure and Director of Open Top Sightseeing, USA, Inc. (R. 174); Sally Hogan, Senior Vice President of Planning, Compliance, and Tax at Go City Limited (R. 178); and Sean Wilkins, Chief Financial Officer for Big Bus Tours Limited (R. 183).

In opposition to Big Bus Tours Limited's and Go City Limited's motion to dismiss, Counterclaim Plaintiff-Appellant submitted only an affirmation of counsel attaching various exhibits. (R. 322.)

The I.A.S. Court (Hon. Jennifer Schecter, J.S.C.) held oral argument on the two motions to dismiss on December 2, 2021. (R. 9.)

By Decision and Order dated December 2, 2021, and entered January 3, 2022 (the "Dismissal Order") (R. 6), the Court granted Big Bus Tours Limited's and Go City Limited's motion to dismiss for lack of personal jurisdiction, and granted the Gray Line Defendants' motion to dismiss the First Counterclaim (for alleged violations of the Donnelly Act) and Second Counterclaim (for tortious interference with prospective business relations) as asserted against them for failure to state a cause of action.

E. This Appeal

Counterclaim Plaintiff-Appellant filed a Notice of Appeal from the I.A.S. Court's Dismissal Order. (R. 2, 4.)

Counterclaim Plaintiff-Appellant seeks reversal of the prong of the Dismissal Order granting the Gray Line Defendants' motion to dismiss the First Counterclaim and Second Counterclaim pursuant to CPLR 3211(a)(7) for failure to state a cause of action.

With respect to the prong of the Dismissal Order granting Big Bus Tours Limited's and Go City Limited's motion to dismiss for lack of personal jurisdiction, Counterclaim Plaintiff-Appellant seeks reversal only with respect to the dismissal of its claims against Big Bus Tours Limited. As limited by its

appellate brief, Counterclaim Plaintiff-Appellant's appeal does not seek reversal of the I.A.S. Court's dismissal of its claims against Go City Limited. (App. Mem. at n.3) ("Go New York does not appeal the dismissal of Go City Limited from this case.").

F. The Stipulation Governing the First and Second Counterclaims as against the Big Bus/Go City Defendants

On July 25, 2022, Counterclaim Plaintiff-Appellant (on the one hand) and the Big Bus/Go City Defendants (on the other hand) entered into a stipulation, titled "Stipulation Regarding First Counterclaim and Second Counterclaim as against the Big Bus Defendants and Go City Defendants," by which the parties stipulated and agreed that the I.A.S. Court's dismissal of the First Counterclaim and Second Counterclaim asserted in the Counterclaims as against the Gray Line Defendants pursuant to CPLR 3211(a)(7) for failure to state a cause of action shall also apply to the First Counterclaim and Second Counterclaim asserted in the Counterclaims as against the Big Bus/Go City Defendants, without prejudice and subject to the outcome of this appeal (the "Counterclaim Stipulation").

The I.A.S. Court "so ordered" the Counterclaim Stipulation on August 1, 2022. (SR. 4.)

Accordingly, in this respondents' brief, in addition to Big Bus Tours Limited's opposition to Counterclaim Plaintiff-Appellant's appeal to the extent it seeks to reverse the dismissal of the claims against Big Bus Tours Limited for lack

of personal jurisdiction, the Big Bus/Go City Defendants also oppose that prong of Counterclaim Plaintiff-Appellant's appeal that seeks to reverse the dismissal of the First Counterclaim and Second Counterclaim for failure to state a cause of action.

I

THE I.A.S. COURT CORRECTLY DISMISSED THE FIRST AND SECOND COUNTERCLAIMS FOR FAILURE TO STATE A CAUSE OF ACTION

A. Legal Standard

The Appellate Division reviews "de novo" a trial court's granting of a motion to dismiss pursuant to CPLR 3211 and applies the same standard as the lower court when reviewing the sufficiency of the pleadings. *See Jericho Grp., Ltd. v. Midtown Dev., L.P.*, 32 A.D.3d 294, 298 (1st Dep't 2006).

On a motion to dismiss pursuant to CPLR 3211(a)(7), the Court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001). However, "allegations consisting of bare legal conclusions, as well as factual claims inherently or flatly contradicted by documentary evidence are not entitled to such consideration." *Tal v. Malekan*, 305 A.D.2d 281, 281 (1st Dep't 2003). Likewise, "conclusory allegations will not serve to defeat a motion to dismiss." *DRMAL Realty LLC v. Progressive Credit Union*, 133 A.D.3d 401, 404 (1st Dep't 2015).

B. The Counterclaims Fail to Plead Facts to Support a Violation of the Donnelly Act

The Donnelly Act, New York's anti-trust statute, codified in General Business Law § 340, governs price fixing and anticompetitive activity, and is intended to further the protection of the federal Sherman Act to citizens of New York. *See Lennon v. Philip Morris Cos.*, 189 Misc.2d 577, 583 (Sup Ct. N.Y. Co. 2001). The Donnelly Act is "designed to protect competition and redress anticompetitive effects of a variety of unlawful business practices," and is "not [a] general prohibition[] of all types of activity which may result in economic harm to any individual business." *Associates Capital Services Corp. of N.J.*, 590 F. Supp. at 13. Stated differently, the antitrust laws, including the Donnelly Act, are concerned with harm to *competition*, not harm to individual *competitors. See, e.g., G.T. Acquisition 1 Corp. v. Bridgestone Firestone N. Am. Tire*, LLC, No. 007876/2004, 2006 WL 1887516, at * 1 (Sup. Ct. Nassau Co. June 5, 2006) (*citing Apex Oil Co. v. DiMauro*, 73 3 F. Supp. 587 (S.D.N.Y. 1989)).

"To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities." *Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 A.D.3d 91, 94 (2d Dep't 2006). This standard

applies both to horizontal and vertical Donnelly Act claims[2]. *See Global Reinsurance Corporation-U.S. Branch v. Equitas Ltd.*, 20 Misc. 3d 1115(A), 867 N.Y.S.2d 16 (Sup. Ct. N.Y. Co. 2008), *reinstated by* 18 N.Y.3d 722 (2012). "The failure to allege any one of these [four] elements is fatal to the claim." *Kings Auto. Holdings, LLC v. Westbury Jeep Chrysler Dodge, Inc.*, Index No. 507892/2014, 2015 WL 4079064, at *11 (Sup. Ct. Kings Co. June 29, 2015) (collecting cases).

1. The Counterclaims Fail to Plead Facts to Support the Existence of an Unlawful Conspiracy

In dismissing Counterclaim Plaintiff-Appellant's Donnelly Act claim for failure to state a cause of action pursuant to CPLR 3211(a)(7), the I.A.S. Court focused primarily on the absence of any factual content alleged in the Counterclaims to support Counterclaim Plaintiff-Appellant's claim of a conspiracy between Counterclaim Defendants-Respondents, or between them and the various Attractions with which Counterclaim Plaintiff-Appellant has sought to enter trade partner agreements. The I.A.S. Court reasoned:

> Again, that some attractions have relationships with the counterclaim defendant movants but choose not to do business with the plaintiff doesn't suffice for an inference of conspiracy to move forward. And there are no allegations of unlawful concerted actions by any particular counterclaim defendants. They are parroting the words of conspiracy, but there isn't any specified place, how, to who, or who did it. And it's not a function

[2] A "horizontal" agreement is one between competitors; a "vertical" agreement is one between a supplier and a distributor. *See Anheuser-Busch, Inc. v. Abrams*, 71 N.Y.2d 327, 331 (1988).

> of giving specific detail, but it's really essential to assessing whether there is a cause of action itself. So the failure to identify any specific participants when it comes to allegations that could support a conspiracy, they are just not there. It's just not true that there is no rational basis for third-parties to do business with defendants and not plaintiffs other than a conspiracy. Conspiracy can't be the only reason, and it's just not sufficient to support a Donnelly Act claim.

(R. 30-31.)

The I.A.S. Court's reasoning was correct, and the dismissal of the Counterclaim Plaintiff-Appellant's Donnelly Act claim should be affirmed.

When alleging a conspiracy in violation of the Donnelly Act, a plaintiff must "specify [] the dates or places relevant to the alleged conspiracy." *Creative Trading Co. v. Larkin-Pluznick-Larkin, Inc.*, 148 A.D.2d 352, 355-56 (1989) (Sullivan, J., dissenting), *dissent adopted*, 75 N.Y.2d 830 (1990). *See also Victoria T. Enterprises, Inc. v. Charmer Indus., Inc.*, 63 A.D.3d 1698 (2009) (affirming dismissal of a Donnelly Act claim for lack of "a reference to date, time or place" of alleged conspiracy). In short, "conclusory allegations of conspiracy are legally insufficient to make out a violation of the Donnelly Act." *Yankees Ent. & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 678 (S.D.N.Y. 2002), (citing *Sands v. Ticketmaster-New York, Inc.*, 207 A.D.2d 687 (1st Dep't 1994)).

As the I.A.S. Court found, Counterclaim Plaintiff-Appellant utterly fails to satisfy its burden to plead facts as to the "when, how, and where" any of the "Counterclaim Defendants" allegedly agreed to conspire with each other. The Counterclaims speculate that such an agreement exists between the Big Bus/Go City Defendants and the Gray Line Defendants, but fail to allege what the terms of that agreement might be, or when or how any such agreement was reached. The Counterclaims repeatedly concludes that "Counterclaim Defendants"—a defined term consisting of three Gray Line entities and six Taxi Tours entities (R. 60 at ¶ 6, R. 61 at ¶¶ 10-11, R. 63 at ¶ 16)—"upon information and belief, conspired with each other." (R. 67 at ¶ 31, R. 70 at ¶¶ 39-40, R. 71 at ¶ 43, R. 72 at ¶ 45). But a plaintiff cannot just "parrot the words 'conspiracy and reciprocal relationship.'" *Creative Trading*, 148 A.D.2d at 356. Instead, to survive a motion to dismiss, a complaint must offer direct evidence by alleging "facts that would tend to establish an unlawful conspiracy." *Id. See also LoPRESTI v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 475 (2d Dep't 2006) ("The plaintiff's cause of action alleging a violation of General Business Law § 340, commonly known as the Donnelly Act, was properly dismissed insofar as asserted against the respondents because the complaint contained only vague, conclusory allegations insufficient to adequately plead a conspiracy or reciprocal relationship between two or more entities.").

Here, the Counterclaims allege in the most conclusory manner that a conspiracy exists, but they do not allege "facts" to support the existence of any conspiracy. In many instances, the Counterclaims do not even allege an agreement between the counterclaim-defendants. For example, the Counterclaims assert that various "Attractions [] have inexplicably refused to work with Go New York" (R. 70 at ¶ 40), and, from that premise, go on to conclude that "Counterclaim Defendants, upon information and belief, have conspired together with these museums and each other to exclude Go New York." (R. 68 at ¶ 35, R. 70 at ¶ 40.) In other words, Counterclaim Plaintiff-Appellant's claimed conspiracy rests on nothing more than naked speculation, which is insufficient to state a claim under the Donnelly Act. *See Go New York Tours, Inc. v. Gray Line New York Tours, Inc.*, No. 19-CV-02832 (LAK), 2019 WL 8435369 (S.D.N.Y. Nov. 7, 2019), *aff'd*, 831 Fed.Appx. 584 (2d Cir. 2020) (dismissing claims for unlawful conspiracy under Sherman Act for failure to state a claim, holding, "Plaintiff must make more than inferential allegations that the success of defendants' businesses relative to plaintiff's implies the existence of an unlawful conspiracy.").

Counterclaim Plaintiff-Appellant's claims regarding a conspiracy between defendants-respondents and various Attractions suffer from the same infirmity: they are hopelessly speculative and devoid of any factual content to support Counterclaim Plaintiff-Appellant's conclusion that such a conspiracy exists.

Dismissal is warranted where a plaintiff "assert[s], in conclusory fashion, the existence of a generalized conspiracy arising out of defendants' various contracts and arrangements or by referring to unilateral business actions taken by them." *Creative Trading Co.*, 148 A.D.2d at 354. That is precisely what the Counterclaims do. Counterclaim Plaintiff-Appellant deduces that there must be a conspiracy because it can think of no other reason for its failure to accomplish certain business goals. (R. 73 at ¶ 48.) That is a "faulty inference." *Go New York Tours, Inc.*, 2019 WL 8435369 at *2. It is not reasonable to infer conspiracy from the smattering of rejections Go New York has allegedly suffered. "In fact, there are many logical and permissible business reasons that the third parties might have chosen not to do business with [Counterclaim Plaintiff-Appellant]." *Id.*

2. The Counterclaims Fail to Plead Facts to Support the Existence of Any Impairment to Competition or Trade

Counterclaim Plaintiff-Appellant's Donnelly Act claim should also be dismissed for an independent pleading defect, namely, the failure to "allege how the economic impact of that conspiracy is to restrain trade in the market in question." *See Benjamin of Forest Hills Realty*, 34 A.D. 3d at 94.

The Counterclaims are replete with the supposed damages that Counterclaim Plaintiff-Appellant purports to have suffered as a result of counterclaim defendants' alleged misconduct, but that is insufficient to state a claim under the Donnelly Act. *See Cont'l Guest Servs. Corp. v. Int'l Bus Servs., Inc.*, 92 A.D.3d

570 (1st Dep't 2012) ("the antitrust laws were enacted to protect competition, not competitors"). Instead, Counterclaim Plaintiff-Appellant must allege *harm to competition in the asserted relevant market*—the "hop-on, hop-off" tour bus industry in New York City—which it fails to do.

The sole allegation with respect to the damage inflicted on consumers and the market by such alleged misconduct is housed in a single, conclusory paragraph containing zero factual detail:

> As a result of the foregoing, Counterclaim Defendants have caused and continue to cause harm to the consuming public by unfairly minimizing competition and inflating prices in the New York City hop-on, hop-off sightseeing tour bus market, as well as harm specifically to Go New York by reason of diminishment of its competitive advantage, including lost customers and sales and reputational damage.

(R. 73 at ¶ 49.)

The Counterclaims plead no facts to support such broad conclusions. And such "conclusory allegations will not serve to defeat a motion to dismiss." *DRMAL Realty LLC*, 133 A.D.3d at 404.

C. The Counterclaims Do Not Plead a Claim for Tortious Interference with Prospective Business Relations

The crux of Counterclaim Plaintiff-Appellant's Second Counterclaim for tortious interference with prospective business relations is that Counterclaim Plaintiff-Appellant would have entered into lucrative trade partner agreements with

various Attractions but for Big Bus/Go City Defendants' and Gray Line Defendants' supposed conspiracy to exclude Counterclaim Plaintiff-Appellant from those Attractions. (R. 67, *et seq.*, at ¶¶ 32-49.)

To state a cause of action for tortious interference with prospective business relations, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Snyder v. Sony Music Ent., Inc.*, 252 A.D.2d 294, 299–300 (1st Dep't 1999). These stringent standards recognize that not every act that disturbs an expected future business relationship is actionable, and conduct that is not independently unlawful is "insufficiently 'culpable' to create liability for interference with prospective contracts or other nonbinding economic relations." *Carvel Corp. v. Noonan*, 3 N.Y 3d 182, 190 (2004).

The I.A.S. Court correctly dismissed Counterclaim Plaintiff-Appellant's tortious interference claim for two reasons. First, the Counterclaims do not allege the existence of any relationship at all between Counterclaim Plaintiff-Appellant and any of the Attractions. Instead, the Counterclaims contain, at most, purely speculative allegations about potential future business relationships, which is insufficient to support a claim for tortious interference with prospective business relations. *See Shawe v. Kramer Levin Naftalis & Frankel LLP*, 167 A.D.3d 481,

483 (1st Dep't 2018) ("Supreme Court correctly dismissed the tortious interference with prospective economic advantage claim because the complaint fails to allege that plaintiff had a relationship with Bank of America with which defendants interfered"); *see also BDCM Fund Adviser, L.L.C. v. Zenni*, 103 A.D.3d 475, 478 (1st Dep't 2013) (plaintiff must allege "reasonable probability of a business relationship" to state a claim for tortious interference with prospective business relations).

For example, the Counterclaims allege that Counterclaim Plaintiff-Appellant has repeatedly attempted to add Top of the Rock as one of the Attractions included in its Multi-Attraction Pass, but "during the past few years the operator of Top of the Rock has rebuffed repeated attempts by Go New York to establish a relationship with it." (R. 68 at ¶ 34.) Rather than having a "reasonable probability of a business relationship" with Top of the Rock, the Counterclaims allege the opposite: "Top of the Rock has consistently rejected Go New York as a trade partner" (R. 68 at ¶ 35.)

The Counterclaims concede that Counterclaim Plaintiff-Appellant's attempts to establish business relationships with other Attractions have fared no better.

The Counterclaims allege that the operators of the Empire State Building Observatory, One World Observatory at the World Trade Center, 9/11 Memorial and Museum, and the 9/11 Tribute Museum each declined Counterclaim Plaintiff-

Appellant's overtures in favor of pre-existing partnerships with certain of the Big Bus/Go City Defendants and Gray Line Defendants. (R. 69 at ¶ 36) ("Go New York has also been shut out of the Empire State Building Observatory, . . . and the operator has told Go New York that it has an exclusive relationship with Leisure Pass's 'New York Pass.'"); (R. 69 at ¶ 37) ("Go New York has also been shut out of One World Observatory at the World Trade Center in Lower Manhattan . . . . Representatives of One World Observatory have told Go New York that it has an exclusive relationship with Mark Marmurstein, the president of Gray Line NY."); (R. 70 at ¶ 40) (the 9/11 Memorial and Museum and the 9/11 Tribute Museum in Lower Manhattan "have inexplicably refused to work with Go New York").

As for Madame Tussauds, the Counterclaims allege that Counterclaim Plaintiff-Appellant approached the wax museum operator "to try to forge a trade partner relationship, but was eventually told that Madame Tussauds was not onboarding additional trade partners." (R. 70 at ¶ 41.)

Finally, the Counterclaims allege that Counterclaim Plaintiff-Appellant previously held a trade partner agreement with the Intrepid, but the operator of that Attraction "unilaterally terminated the agreement just as Go New York began sending its customers there," which the Counterclaims acknowledge was Intrepid's right under their contract. (R. 69, *et seq.*, at ¶¶ 38-39.)

Rather than alleging the existence of a protected business relationship, or the "reasonable probability" of one, the Counterclaims allege nothing more than one-sided efforts by Counterclaim Plaintiff-Appellant to enter into business relationships (or, in the case of the Intrepid, rekindle a former business relationship) with various Attractions. But it is well settled that simply alleging a one-sided desire to go into business with a third-party, or even alleging the active solicitation of a future business relationship, as the Counterclaims allege, is not enough to state a valid claim, particularly when (as here) no non-speculative facts are alleged to support that the third party had a reciprocal interest. *See BDCM*, 103 A.D.3d 475 at 478 (reversing trial court and dismissing tortious interference claim where "plaintiffs offered only vague and conclusory allegation that [it] had a reasonable probability of a business relationship with this company"); *see also Gans v. Wilbee Corp.*, 199 A.D.3d 564, 158 N.Y.S.3d 81 (2021) (affirming dismissal of claim for tortious interference with prospective economic advantage, explaining, "[t]o the extent that plaintiffs argue that the allegations in the complaint demonstrate the viability of a renewed business relationship with the Landowner Defendants, these allegations are one-sided; the complaint is devoid of allegations that the Landowner Defendants reciprocated any of plaintiffs' interest in continuing the business relationships").

The I.A.S. Court (R. 31) also properly dismissed Counterclaim Plaintiff-Appellant's tortious interference claim for a second, independent reason: the Counterclaims fail to allege that Defendants-Respondents employed any "wrongful means," which the Court of Appeals has defined to include "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure." *Guard-Life Corp.*, 50 N.Y.2d at 191. The closest the Counterclaims come to alleging any such conduct is its vague, factually unsupported contention that unnamed defendants persuaded various Attractions to not do business with Counterclaim Plaintiff-Appellant by impugning the quality of Counterclaim Plaintiff-Appellant's services. (R. 72 at ¶ 46) ("Go New York has been consistently and repeatedly informed by Attractions that executives of Counterclaim Defendants have told them that TopView is an 'inferior/low cost/low quality' service which operates unsafe and/or unlicensed vehicles and that the attractions are risking their reputations if they contract with Go New York."). But Defendants-Respondents' opinions about Counterclaim Plaintiff-Appellant's offering are not actionable as a matter of law. *See NBT Bancorp Inc. v. Fleet/Norstar Fin. Grp. Inc.*, 215 A.D.2d 990, 992 (3d Dep't 1995), *aff'd*, 87 N.Y.2d 614 (1996) ("Macfarland's critical opinion as to stock overvaluation is an expression of opinion about NBT's stock price and does not constitute actionable misrepresentation.").

At most, the Counterclaims allege that Defendants-Respondents successfully persuaded various Attractions to maintain exclusive relationships with them, rather than enter into new trade partner agreements with Counterclaim Plaintiff-Appellant. But it is well settled that "persuasion alone, although it is knowingly directed at interference" with plaintiff's potential business relationship, does not constitute "wrongful means" sufficient to support a claim for tortious interference with prospective business relations. *Guard-Life,* 50 N.Y.2d at 191.

II

THE I.A.S. COURT CORRECTLY DISMISSED THE CLAIMS AGAINST BIG BUS TOURS LIMITED BECAUSE IT IS NOT SUBJECT TO PERSONAL JURISDICTION IN NEW YORK

Before the I.A.S. Court, Counterclaim Plaintiff-Appellant argued that defendant-respondent Big Bus Tours Limited and defendant-respondent Go City Limited—both incorporated and headquartered in the United Kingdom—are subject to general jurisdiction in New York pursuant to CPLR 301, as well as specific jurisdiction in New York under the State's "long-arm" statute, CPLR 302. The I.A.S. Court rejected both purported bases for personal jurisdiction over these foreign entities, and dismissed the Counterclaims as against them. (R. 6.)

On appeal, Counterclaim Plaintiff-Appellant abandons its opposition to Go City Limited's jurisdictional challenge, implicitly acknowledging that it is not subject to personal jurisdiction in New York. (App. Br. n.3.)

Instead, Counterclaim Plaintiff-Appellant only appeals from that prong of the Dismissal Order finding that defendant-respondent Big Bus Tours Limited is not subject to personal jurisdiction in New York. Further refining its arguments, Counterclaim Plaintiff-Appellant also no longer contends that Big Bus Tours Limited is subject to general jurisdiction in New York under CPLR 301. Instead, Counterclaim Plaintiff-Appellant's brief cites only to CPLR 302(a)(1) and (a)(3) as the purported bases upon which the Court may exercise personal jurisdiction over Big Bus Tours Limited. (App. Br. at 35.)

The I.A.S. Court rightly rejected both of Counterclaim Plaintiff-Appellant's "long-arm" jurisdictional theories.

A. Legal Standard

The party seeking to assert jurisdiction bears "the ultimate burden of proof" to establish a basis for personal jurisdiction. *Daniel B. Katz & Assoc. Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 978 (2d Dep't 2011) (internal quotation marks and citations omitted); *Copp v. Ramirez*, 62 A.D.3d 23, 28 (1st Dep't 2009). It is not enough to plead jurisdiction over the defendants as a group—Counterclaim Plaintiff-Appellant is obliged "to prove that personal jurisdiction exists over each of the defendants." *BGC Partners, Inc. v. Avison Young (Canada) Inc.*, 46 Misc. 3d 1202(A), at *3 (Sup. Ct. N.Y. Co. Dec. 15, 2014) (*citing Copp*, 62 A.D.3d at 28–29) (emphasis added).

B. Big Bus Tours Limited Is Not Subject to Specific Jurisdiction Under CPLR 302(a)(1) Because It Did Not, and Does Not, Transact Business in the State of New York

Personal jurisdiction under CPLR 302(a)(1) exists "where [1] a defendant transacted business within the state, and [2] the cause of action arose from that transaction." *Copp*, 62 A.D.3d 23 at 28. "If either prong of the statute is not met, jurisdiction cannot be conferred." *Johnson v. Ward*, 4 N.Y.3d 516, 519 (2005). A foreign defendant "transact[s] business" in New York when it engages in "purposeful activities" within the state by which the defendant, through "volitional acts . . . avails itself of the privilege of conducting activities within" New York, "invoking the benefits and protections of its laws." *Coast to Coast Energy, Inc. v. Gasarch*, 149 A.D.3d 48, 486 (1st Dep't 2017). *See also D & R Glob. Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298 (2017) ("A non-domiciliary defendant transacts business in New York when on his or her own initiative, the non-domiciliary projects himself or herself into this state to engage in a sustained and substantial transaction of business.").

Although the Counterclaims allege that Big Bus Tours Limited is the parent company of New York-based Open Top Sightseeing USA, Inc. and Taxi Tours, Inc. (R. 60 at ¶¶ 4-5), the Counterclaims do not allege a single forum-based, claim-related act by Big Bus Tours Limited, nor describe a single act that might support a conclusion that Big Bus Tours Limited "transacted business" by engaging in

"purposeful activities" within the State. *Coast to Coast Energy, Inc.*, 149 A.D.3d at 486. Big Bus Tours Limited has no connections to New York (related to the Counterclaims or otherwise) sufficient to confer personal jurisdiction: it is undisputed that Big Bus Tours Limited has no offices, employees, licenses, addresses, phone or fax numbers, agents of service, tour buses, board meetings, or real property in New York, nor does it pay taxes in, or derive substantial revenue from, New York. (R. 183 at ¶¶ 5, 7, 10–16.)

Counterclaim Plaintiff-Appellant advances two theories for why Big Bus Tours Limited nevertheless should be subject to personal jurisdiction in New York—both fail to pass muster.

First, Counterclaim Plaintiff-Appellant argues that Big Bus Tours Limited's provision of various "management services" to its subsidiaries around the world—including Open Top Sightseeing USA, Inc. and Taxi Tours, Inc. which operate in New York—as well as its hosting a website for ticket sales that is accessible to New Yorkers, are facts sufficient to subject Big Bus Tours Limited to personal jurisdiction in this State. (App. Br. at 35-36.)

The fact that Big Bus Tours Limited has New York-based subsidiaries is irrelevant, by itself, to the jurisdictional analysis. Counterclaim Plaintiff-Appellant notes that the Counterclaims allege that Big Bus Tours Limited and its New York subsidiaries have common ownership (R. 60 at ¶¶ 4-5), but "common ownership is

'intrinsic to the parent-subsidiary relationship and, by itself, not determinative.'" *Wolberg v. IAI N. Am., Inc.*, 161 A.D.3d 468, 77 (1st Dep't 2018) (citation omitted) (ordering dismissal for lack of personal jurisdiction where foreign parent "showed that it observed corporate formalities" in regard to wholly-owned U.S. subsidiary that did business in New York). Rather, to assert jurisdiction over a foreign parent based on the activities of its domestic subsidiary, Counterclaim Plaintiff-Appellant would need to show that "the foreign parent's control of the subsidiary is so pervasive that the corporate separation is more formal than real." *Porter v. LSB Indus., Inc.*, 192 A.D.2d 205 (4th Dep't 1993) (citation omitted). But the Counterclaims allege no facts to support any such inference, instead conclusorily alleging that "Big Bus Tours Limited, Open Top Sightseeing USA, Inc., and Taxi Tours, Inc. act in concert through common management to operate 'hop-on, hop-off' sightseeing tour buses in New York City," while at the same time conceding that "the specific responsibilities and roles of each of them are presently unknown to Go New York. (R. 60 at ¶ 6.)

In addition to failing to allege facts to support a conclusion that the corporate separation between Big Bus Tours Limited and its New York subsidiaries "is more formal than real," the record evidence submitted by Big Bus Tours Limited demonstrates that no such showing could be made in any event. (R. 174 at ¶¶ 7–13, R. 183 at ¶¶ 5–7, 9, 11–15, 17.) Imputing jurisdiction to a foreign ultimate parent

corporation is especially unwarranted here, given the unrebutted evidence that "[t]he operations, offices, and revenues" of Big Bus Tours Limited "are separate and distinct, and the entities are managed independently." (R. 183 at ¶ 23.)

Counterclaim Plaintiff-Appellant attempts to overcome this vast jurisdictional gap by contending that Big Bus Tours Limited "acts as the global head office and provides resources, advisory and other services to group entities" such as "corporate strategy, accountancy services, information technology, brand marketing, fleet management and online sales platform." (App. Br. at 10.) But those are standard services offered by countless parent companies and not the sort of "volitional acts" by which a company "avails itself of the privilege of conducting activities within" New York, "invoking the benefits and protections of its laws." *Coast to Coast Energy, Inc.*, 149 A.D.3d at 486 (affirming dismissal for lack of personal jurisdiction even though foreign principal "was in daily communication" with its domestic agents and "instructed [domestic agent] concerning distributions and 'routinely' directed him to transfer funds").

Likewise insufficient is Counterclaim Plaintiff-Appellant's observation that Patrick Waterman serves as a director of Big Bus Tours Limited, and is also Chief Executive Officer of New York-based Taxi Tours and Open Top USA. (App. Br. at 12-13.) New York courts routinely reject the attempt to equate service on multiple boards with the "pervasive" control required by New York's personal

jurisdiction jurisprudence. *See Porter*, 600 N.Y.S.2d 867 at 873 (finding no long-arm jurisdiction and stating that although "[t]here is complete stock control, and the directors and officers of the two entities overlap to an extent, . . . those factors are intrinsic to the parent-subsidiary relationship and, by themselves, not determinative") (citation omitted). To the contrary, a foreign company's "control" for purposes of personal jurisdiction "cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation." *Coast to Coast Energy, Inc.*, 149 A.D.3d at 486 (citations omitted). Moreover, a foreign individual's "status as a principal of [the domestic affiliate]" does not "in and of itself confer jurisdiction," even when associated with regular intercompany communication, instructions to the domestic affiliate, and directions to transfer funds. *Id.*

Counterclaim Plaintiff-Appellant's second basis for this Court's purported personal jurisdiction over Big Bus Tours Limited derives from the "Industry Guidelines Agreement," which Counterclaim Plaintiff-Appellant describes as "establishing guidelines for the New York City double-decker tour bus industry. (App. Br. at 10-11.) According to Counterclaim Plaintiff-Appellant, the fact that Big Bus Tours Limited is identified as a party to that agreement supports a conclusion that "it regularly engages in business in and derives substantial revenue from New York State. (App. Br. at 36.) This is a red herring for two reasons.

As a threshold matter, the record is undisputed that the identification of Big Bus Tours Limited as a party to the Industry Guidelines Agreement is the result of a mistake. First, the document was not drafted by Taxi Tours, Inc., Open Top Sightseeing USA, Inc., Big Bus Tours Limited, or any employee of those entities. (R. 174 at ¶ 10.) Rather, it came about as part of a settlement to resolve litigation between Counterclaim Plaintiff-Appellant and the Gray Line Defendants that did not involve Big Bus Tours Limited. (R. 174 at ¶¶ 9–10.) When Counterclaim Plaintiff-Appellant and the Gray Line Defendants sought to include the other significant New York "hop-on, hop-off" tour bus operator to address New York conduct, they sent the draft of the agreement to Julia Conway, the Treasurer and a Director for Taxi Tours, Inc., with an errant signature block listing Big Bus Tours Limited as the signatory. (R. 174 at ¶¶ 9–10.) Ms. Conway mistakenly signed the document, drafted by someone else, that included her name but the wrong company, not realizing the entity listed was wrong. (R. 174 at ¶ 10.) It is undisputed that Ms. Conway is not an employee of Big Bus Tours Limited, and she did not have, and does not have, authority to bind Big Bus Tours Limited to any agreement, nor did she intend to bind Big Bus Tours Limited to the Industry Guidelines Agreement. (R. 174 at ¶¶ 8, 11.) Ms. Conway intended to sign the agreement on behalf of Taxi Tours, Inc., a New York-entity for which she works, and not Big Bus Tours Limited—a fact she has communicated to Counterclaim

Plaintiff-Appellant multiple times. (R. 174 at ¶¶ 11–12.) Each of these facts is unrebutted.

In any event, even assuming that Big Bus Tours Limited was an intentional party to the Industry Guidelines Agreement, that fact would be irrelevant to a jurisdictional analysis under CPLR 302. Counterclaim Plaintiff-Appellant fails to cite to any authority for the novel proposition it offers on this appeal that a non-domiciliary's entry into a one-off agreement with a New York-based counterparty does not, by itself, constitute "doing business" in this State sufficient to confer personal jurisdiction. And, as described above, the Counterclaims do not allege a single act by Big Bus Tours Limited that might support the conclusion that it "transacted business" by engaging in any other "purposeful activities" within the State. *Coast to Coast Energy*, 149 A.D.3d at 486.

Moreover, for Big Bus Tours Limited's purported agreement to the Industry Guidelines Agreement to confer long-arm jurisdiction over it in this action, Counterclaim Plaintiff-Appellant's claims in this action must have an "articulable nexus" or "substantial relationship" to that transaction. *See D & R Glob. Selections, S.L.*, 29 N.Y.3d at 298-99 ("It is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction. In addition, the plaintiff's cause of action must have an 'articulable nexus' or 'substantial relationship' with the defendant's transaction of business here.").

Here, Counterclaim Plaintiff-Appellant does not allege that its claims in this action arise from the Industry Guidelines Agreement, or are related to the parties' obligations under the Industry Guidelines Agreement. And if it did, those claims would be subject to the Industry Guideline Agreement's mandatory mediation and arbitration provisions (R. 154 at p. iv), as Counterclaim Plaintiff-Appellant acknowledges (R. 76 at ¶ 58).

To the contrary, Counterclaim Plaintiff-Appellant's claims arise from Defendants-Respondents' alleged anti-competitive conduct—the Counterclaims allege that Defendants-Respondents engaged in a conspiracy to "freeze-out" Counterclaim Plaintiff-Appellant from various tourist attractions throughout New York City, and violated New York consumer protection laws by "engaging in a pattern and practice of astroturfing, posting face disparaging reviews, and making false and/or misleading representations" in their advertising materials. (R. 80 at ¶ 79.) In contrast, the Counterclaims acknowledge that the Industry Guidelines Agreement merely "establish[ed] industry-wide conduct guidelines for the companies' respective street-level ticket agents and bus drivers in New York City," matters entirely unmoored from Counterclaim Plaintiff-Appellant's claims in this action. (R. 76 at ¶ 58.)

And to the extent the Counterclaims do cite to alleged "street-level" conduct barred by the Industry Guidelines Agreement, there is no allegation that Big Bus

Tours Limited or its employees specifically engaged in such conduct. (R. 58) ("Taxi Tours has, upon information and belief, directed its bus drivers and ticket agents to interfere with Go New York's TopView business by engaging in street-level misconduct . . . "). The Counterclaims' improper group pleading against all Big Bus/Go City Defendants does not suffice.

C. Big Bus Tours Limited Is Not Subject to Specific Jurisdiction Under CPLR 302(a)(3) Because the Complaint Does Not Allege that Big Bus Tours Limited Committed Any Tortious Act

Counterclaim Plaintiff-Appellant next turns to CPLR 302(a)(3), under which the Court may exercise long-arm jurisdiction over an out-of-state defendant if the defendant's alleged tortious act causes injury within New York. Big Bus Tours Limited is likewise not subject to personal jurisdiction in New York on this basis.

As a threshold matter, as described above, the Counterclaims fail to plead any tortious conduct at all.

Moreover, the purported misconduct described in the Counterclaims are alleged broadly against all "defendants." The Counterclaims do not allege any tortious conduct—undertaken in New York or elsewhere but affecting Counterclaim Plaintiff-Appellant here—by Big Bus Tours Limited. Even if made, such allegations would not survive minimal scrutiny: the alleged conduct—that defendants disparaged Counterclaim Plaintiff-Appellant to New York City tourist attractions and threatened to suspend relationships with those attractions—makes

sense only if undertaken by entities that have relationships with New York City tourist attractions. Big Bus Tours Limited does not. (R. 183 at ¶ 17.)

Instead, all the Counterclaims offer is group pleading camouflaged as an alleged "conspiracy," a jurisdictional theory that requires exacting, not deferential, review. (R. 69 at ¶ 36.) To assert "conspiracy"-based jurisdiction over Big Bus Tours Limited under CPLR 302(a)(2), Counterclaim Plaintiff-Appellant was required to plead that "(a) the defendant had an awareness of the effects in New York of its activity; (b) the activity of the co-conspirators in New York was to the benefit of the out-of-state conspirators; and (c) the co-conspirators acting in New York acted at the direction or under the control, or at the request of or on behalf of the out-of-state defendant." *Norex Petroleum Ltd. v. Blavatnik*, 48 Misc. 3d 1226(A), at *16 (Sup. Ct. N.Y. Co. Aug. 25, 2015) (*citing Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428 (1st Dep't 2013)). The Counterclaims allege none of that, instead substituting Counterclaim Plaintiff-Appellant's own self-serving incredulity for "facts": "[i]t is implausible and, indeed, inconceivable that this virtual boycott would occur unless Counterclaim Defendants were conspiring together." (R. 73 at ¶ 48.)

Stated simply, Counterclaim Plaintiff-Appellant's basis for jurisdiction under CPLR 302(a)(2) is based on nothing more than a hunch, and a poor one at that. But hunches are not enough to survive a motion to dismiss. *See Bluewaters*

Commc'ns Holdings, LLC v. Ecclestone, 122 A.D.3d 426, 427 (1st Dep't 2014) ("[T]he mere conclusory claim that an activity is a conspiracy does not make it so.") (*quoting Pramer S.C.A. v. Abaplus Int'l Corp.*, 76 A.D.3d 89, 97 (1st Dep't 2010)); *Peters v. Peters*, 101 A.D.3d 403, 404 (1st Dep't 2012) (finding Plaintiff's jurisdictional allegations under CPLR 302(a)(2) that defendants "committed a tort in New York in furtherance of a conspiracy" to be "conclusory"); *Wyser-Pratte Mgmt. Co. v. Babcock Borsig AG*, 23 A.D.3d 269, 270 (1st Dep't 2005) (holding "plaintiff's allegations of conspiracy and agency" to be "wholly inadequate to set forth the requisite jurisdictional predicate").

D. The Exercise of Personal Jurisdiction over Big Bus Tours Limited Would Contravene Due Process

Even if Counterclaim Plaintiff-Appellant established that Big Bus Tours Limited's "relationship with New York falls within the terms of CPLR 302," Big Bus Tours Limited may only be subject to personal jurisdiction in this State if doing so "comports with due process." *LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 214 (2000); *see also Carpino* v. *Natl. Store Fixtures Inc.*, 275 A.D.2d 580, 582 (3d Dep't 2000) (even "conceding with some difficulty that the basic elements necessary to confer jurisdiction under CPLR 302(a)(3)(ii) are present, the application of due process principles precludes a finding that New York may exercise jurisdiction over" defendant). New York courts cannot exert specific

jurisdiction over a defendant if so doing would "offend traditional notions of fair play and substantial justice." *Williams*, 33 N.Y.3d at 528 (citation omitted).

The core purpose behind jurisdictional limits is the need to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). This is why "[d]ue process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the 'random, fortuitous, or attenuated' contacts he makes by interacting with other persons affiliated with the State." *Walden*, 571 U.S. at 286.

New York courts apply the U.S. Supreme Court's "minimum contacts" test to determine whether a court's exercise of jurisdiction is permissible under the Constitution. *See Williams*, 33 N.Y.3d at 528–29. The relevant factors under this test are: (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. *See Asahi Metal Indus. Co. v. Superior Ct. of California, Solano Cnty.*, 480 U.S. 102, 113 (1987).

Each of these factors weighs against finding jurisdiction over Big Bus Tours Limited: (i) Big Bus Tours Limited would be burdened substantially if forced to

defend litigation in New York when it is domiciled in the United Kingdom, and none of its employees are based in New York (R. 183 at ¶¶ 4–5); (ii) New York, the United States, and Counterclaim Plaintiff-Appellant have little interest in haling Big Bus Tours Limited to court in New York because, should Counterclaim Plaintiff-Appellant succeed on the merits of its claims, it can obtain all the relief it seeks from the U.S.-based defendants in this case; and (iii) adding Big Bus Tours Limited would not promote efficiency or any fundamental social policies. Accordingly, even were the Court to find that CPLR 302 permitted it to exercise personal jurisdiction over a defendant organized under the laws of the United Kingdom, with no U.S. offices or employees, or other physical presence in the United States (R. 183 at ¶¶ 4–5), it should decline jurisdiction over Big Bus Tours Limited on due process grounds.

E. Counterclaim Plaintiff-Appellant Waived its Opportunity to Conduct Jurisdictional Discovery

Unable to show a factual basis on which to justify the exercise of personal jurisdiction over the Foreign Defendants, Counterclaim Plaintiff-Appellant retreats to a request for jurisdictional discovery, having raised that request for the first time in its opposition to Defendants-Respondents' motion to dismiss before the I.A.S. Court. (R. 320.) The I.A.S. Court correctly rejected Counterclaim Plaintiff-Appellant's request.

The decision whether to permit jurisdictional discovery is a matter of discretion. *See, e.g.*, *McBride v. KPMG Int'l*, 135 A.D.3d 576 (1st Dep't 2016) ("The court providently exercised its discretion in denying plaintiffs' request for jurisdictional discovery since plaintiffs failed to submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction . . . ."). Here, Counterclaim Plaintiff-Appellant failed to submit an affidavit setting forth which jurisdictional facts "might exist but could not . . . be stated" at the time the request is made. *Id.*

Counterclaim Plaintiff-Appellant's contention that it requires jurisdictional discovery to overcome Big Bus Tours Limited's jurisdictional challenge is especially improper here, because it was offered the opportunity to conduct that discovery before Big Bus Tours Limited's motion to dismiss before the I.A.S. Court, but Counterclaim Plaintiff-Appellant declined.

Even before filing the underlying motion to dismiss, counsel for Big Bus Tours Limited reached out to Counterclaim Plaintiff-Appellant's counsel and offered to adjust the briefing schedule to allow for jurisdictional discovery. Counterclaim Plaintiff-Appellant's counsel acknowledged the offer. And then he went silent. (R. 726) (exchange of email with counsel for Counterclaim Plaintiff-Appellant). Specifically, Big Bus Tours Limited's counsel notified Counterclaim Plaintiff-Appellant's counsel that Big Bus Tours Limited (and Go City Limited)

intended to seek dismissal of the Counterclaims for lack of personal jurisdiction, and offered to enter into a schedule for any jurisdictional discovery that Counterclaim Plaintiff-Appellant wished to take, in line with the parties' discovery agreement and to permit Counterclaim Plaintiff-Appellant the opportunity to make a record before filing an opposition to the motions to dismiss. *Id.* Counterclaim Plaintiff-Appellant's counsel thanked Big Bus Tours Limited's counsel for the email, and never responded to the offer to adjourn briefing on the underlying motion to dismiss to permit jurisdictional discovery. *Id.*

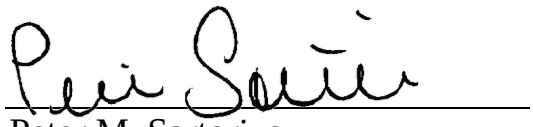
On the facts, and especially in light of its failure to specify the facts that are presently unavailable but which it would seek to prove to establish personal jurisdiction, Counterclaim Plaintiff-Appellant should be deemed to have waived its argument for jurisdictional discovery, having failed to seek such discovery prior to the I.A.S. Court's resolution of the underlying motions to dismiss.

CONCLUSION

For the reasons set forth herein, counterclaim defendants-respondents Big Bus Tours Limited and Go City Limited, and counterclaim defendants Go City North America, LLC, Go City, Inc., Taxi Tours, Inc., and Open Top Sightseeing USA, Inc., respectfully submit that the I.A.S. Court's Order, as much appealed from, should be affirmed.

Dated: New York, New York
August 10, 2022

OLSHAN FROME WOLOSKY LLP

By: 

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PETER M. SARTORIUS